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No. 86-696

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

FIDELITY FINANCIAL CORPORATION,
Petitioner,

v.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioner had no protectable property interest in receiving advances (loans) from the respondent because the governing statute, the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421-1449 (1982), grants the respondent discretion to deny any advance application.

2. Whether the court of appeals correctly concluded that the district court did not abuse its discretion by denying petitioner leave to file a fourth amended complaint where the district court had announced its decision to grant summary judgment for respondent, the factual bases for petitioner's claims were known to it long before, the proposed amendment restated petitioner's prior claims under new labels, and permitting amendment would have prejudiced respondent.

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INTRODUCTION

Petitioner Fidelity Financial Corporation [1] purports to raise four questions for the Court's consideration. *Petition* at i. (References to pages in Fidelity's petition are hereafter cited as "*Pet.* —.") An examination of the

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[1] Fidelity Financial Corporation is the parent company of Fidelity Savings and Loan Association ("Fidelity" or "the Association"), a thrift institution chartered under the laws of the State of California. For ease of reference, throughout this brief we hereafter refer to Fidelity as if it were suing in its own behalf.

opinion of the United States Court of Appeals for the Ninth Circuit that is presented for review,[2] however, reveals that only two issues are properly framed for possible review:

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[2] The opinion of the Ninth Circuit that is the subject of Fidelity's petition is captioned *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, reported at 792 F.2d 1432 (9th Cir. 1986), and attached as Appendix A to Fidelity's petition. Fidelity intentionally and erroneously asserts in its petition that (i) the Ninth Circuit has issued a "prior opinion . . . in this case" captioned *Fidelity Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), *Pet.* 1, and (ii) the Ninth Circuit in this case "ruled inconsistently with its prior decision" because in that "prior decision" the Ninth Circuit allegedly "stated its understanding that there would be a hearing on the merits [of Fidelity's claims against the respondent Federal Home Loan Bank of San Francisco]." *Pet.* 4. Both of these assertions are false. The so-called "prior decision" of the Ninth Circuit, attached as Appendix B to Fidelity's petition ("*Pet. App.* B-—") involves a dispute that Fidelity had with the *Federal Home Loan Bank Board* (not respondent Federal Home Loan Bank of San Francisco, hereinafter "the Bank") over the appointment of the Federal Savings and Loan Insurance Corporation ("FSLIC") as federal receiver of Fidelity ("the receivership case"). The receivership case has no relevance to the instant dispute, which involves the Bank's credit practices *before* Fidelity went into receivership. The Ninth Circuit remanded the receivership case to the district court solely for consideration of whether one of three statutory conditions required for the appointment of FSLIC as receiver had been met. *Pet. App.* B-20. The Ninth Circuit's opinion in the receivership case clearly did not promise Fidelity anything with respect to the ultimate disposition of this case.

Moreover, the only reason there has not yet been (and may never be) any further proceedings before the district court in connection with the receivership case is because Fidelity voluntarily entered into an agreement to that effect. Thus, after the district court disposed of all Fidelity's claims against the Bank in this case, Fidelity entered into an agreement with the Federal Home Loan Bank Board, the primary defendant in the receivership case, which provides that (i) further proceedings in the receivership case are stayed pending final disposition of Fidelity's petition for a writ of certiorari in this case and (ii) Fidelity will dismiss its complaint in the receivership

(1) whether Fidelity has no Fifth Amendment due process claim against the Bank with respect to certain decisions of the Bank regarding the making of loans to Fidelity, because the Association had no protectable property interest in obtaining those loans on the terms it demanded; and

(2) whether the district court did not abuse its discretion in refusing to allow Fidelity to amend its complaint for a fourth time to assert certain contract claims.

The Ninth Circuit's rulings on these issues are correct and are not in conflict with the decisions of any other United States circuit court of appeals. Nor does this case present any unsettled legal issues of national importance. To the contrary, insofar as Fidelity's Fifth Amendment claim is concerned, the applicable federal statutory and regulatory provisions made it clear long before Fidelity's claim arose (in November 1979) that Fidelity had no entitlement to receive loans (called "advances") from the Bank. Thus, section 9 of the Federal Home Loan Bank Act ("Bank Act"), 12 U.S.C. §§ 1421-1449 (1982), provided then, as it has since it was adopted in 1932, that an association like Fidelity is merely "entitled to *apply* . . . for advances" but that the Bank "may *at its discretion* deny *any* such application, or, subject to the approval of the [Federal Home Loan Board], may grant it on such conditions as the [Bank] may prescribe." 12 U.S.C. § 1429 (1982) (emphasis added). Similarly, regulations promulgated by the Federal Home Loan Bank Board ("Bank Board"), the independent agency under whose regulatory and supervisory authority the Bank must op-

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case with prejudice if its petition is denied. The foregoing agreement is filed in the receivership case as a Stipulation and Order, signed by the district court judge and by one of the two law firms acting as counsel for Fidelity in connection with its petition. A true and correct copy of that Stipulation and Order is attached hereto as Appendix C. We respectfully submit that on the basis of these circumstances alone, it is appropriate to deny Fidelity's petition. *See* SUP. CT. R. 21.5.

erate, underscored the fact that Fidelity had no entitlement to Bank advances:

> [The Bank] *may* make advances to members, subject to regulations and restrictions the [Bank] Board may prescribe. *Access by members to advances is a privilege* which may be limited under the Act.

12 C.F.R. § 531.1(a) (1979) (emphasis added).

Contrary to Fidelity's assertions, therefore, no need exists to clarify whether a member or thrift institution like Fidelity has an entitlement to obtain Federal Home Loan Bank ("FHLB") advances on terms demanded by the institution. The relevant statutory and regulatory language make it clear that no such entitlement exists, or has ever existed.[3]

Nor are there any inequities presented by the facts of this case. As both the Ninth Circuit and district court noted, Fidelity's claim against the Bank arises out of the Bank's refusal in November 1979 to grant Fidelity a requested advance because of the Bank's determination that Fidelity was overcommitted (*i.e.*, its outstanding loan commitments were not reasonably related to its anticipated inflow of funds), and therefore failed to meet the Bank's established *minimal* criteria for regular Bank advances. *Pet. App.* A-2; E-21.[4] That determination

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[3] Not surprisingly, this is the first reported case, and the only case of which we are aware, where a member thrift institution has sued a FHLB claiming a right to receive FHLB advances on particular terms. The appellate record demonstrates that Fidelity itself never claimed such a right until after it had borrowed almost a billion dollars from the Bank and its financial collapse was imminent. Only then did Fidelity's management desperately try to shift responsibility for Fidelity's demise from their speculative lending practices, where such responsibility clearly lies (*see* discussion *infra*, pp. 7-8), to the Bank.

[4] "*Pet. App.* —" refers to the appendices that are part of Fidelity's petition. *Pet. App.* A sets forth the opinion of the Ninth Circuit below; *Pet. App.* E is the district court's decision granting summary judgment in the Bank's favor.

was made in accordance with the express, written terms of the Bank's published credit program adopted in 1975, four years before Fidelity was denied regular credit, and of which, in the words of the district court, "Fidelity had ample notice." *Pet. App.* E-21.

Moreover, as the district court found, the Bank's determination came after Fidelity had received a specific warning in June 1979 that its continuing eligibility for regular Bank advances was "dependent upon its maintaining a reasonable relationship between total fixed cas[h] commitments and anticipated sources of funds." *Pet. App.* E-21. Rather than heed that warning, however, "Fidelity continued to enter into staggering levels of new loan commitments totalling some $711 million dollars in the five months between June and October, 1979," *id.*, as part of what the district court described as a massive interest rate gamble consciously undertaken by Fidelity's management. *Id.* at E-18.

As the district court found, the Bank's 1975 published credit program provided, *inter alia*, that (i) members that were overcommitted were ineligible for regular advances and (ii) members ineligible for regular advances could, if they wished, receive Other Special Credit ("OSC") advances on certain terms specified in writing in the credit program.[5] *Pet. App.* E-21. Upon being declared ineligible for regular Bank advances in November 1979, Fidelity immediately asked for and received a $60 million OSC advance. *Pet. App.* A-2. The appellate record establishes that after that time, Fidelity never again qualified for regular Bank advances. Fidelity continued, however, to request and obtain OSC advances until April 1982, when the huge losses attributable to its

[5] The Ninth Circuit noted that OSC advances were available for up to one year at an interest rate equal to the Bank's regular rate plus 2% and that a borrower was required to repay fully all OSC advances before regaining eligibility for regular advances. *Pet. App.* A-2.

speculative lending practices brought about its financial collapse and it was placed into receivership. *Cf. Pet. App.* E-18. By that time, as the Ninth Circuit noted, the Bank had loaned Fidelity a total of almost $1.4 *billion*. *Pet. App.* A-2. Without these enormous advances, Fidelity could not have survived as long as it did.

Fidelity's second major contention invites the Court to consider contract claims that were never decided by the district court or the Ninth Circuit. In fact, all that might properly be reviewed in relation to Questions 3 and 4 in Fidelity's petition, *Pet. i*, is whether the district court abused its discretion in refusing to permit Fidelity to amend its complaint for a fourth time. Thus, Fidelity's contention that the Ninth Circuit improperly refused to recognize that it "had a justiciable contract right, . . . which is important to clarify for the whole financial community," *Pet.* 13, is specious. This issue is not properly presented on the basis of the record below. All the Ninth Circuit decided, or was required to decide, was whether the district court abused its discretion by refusing to allow Fidelity to amend its complaint for a fourth time to allege a contract-based cause of action, two-and-a-half years after commencing its action and two months after the district court announced summary judgment in the Bank's favor. We respectfully suggest that the Ninth Circuit's disposition of this question was clearly correct and, in any event, that whether the district court abused its discretion in refusing to permit such an amendment is hardly a matter of national concern, to the financial or any other community.

BACKGROUND OF THE CASE

A. The Parties

Fidelity was a member/shareholder of the respondent Bank. *Pet. App.* A-2. The Bank is part of the Federal Home Loan Bank System created by Congress in 1932 to establish a reserve system able to provide a reliable source

of funds to home buyers through financial intermediaries, primarily savings and loan associations ("S&Ls").[6]

The twelve regional FHLBs are expressly authorized to act as central credit facilities for the S&Ls in their districts by providing them funds in the form of "advances"—loans collateralized primarily by home mortgages. 12 U.S.C. § 1430 (1982). The primary source of FHLB funds for these advances is the FHLBs' sale of consolidated FHLB obligations, which are debt instruments constituting the joint and several obligations of the FHLBs, 12 U.S.C. § 1431(a) (1982), that are not guaranteed by the United States. 12 U.S.C. § 1435 (1982). Since the FHLBs must sustain their own creditworthiness in order to sell and support these obligations, the FHLBs must conduct their financial affairs prudently and maintain their own financial strength.[7]

B. Fidelity's Interest Rate Gamble

This case has its genesis in what both the district court and the Ninth Circuit properly recognized was a massive interest rate gamble consciously undertaken by Fidelity's management and controlling stockholders. *Pet. App.* E-18; B-2. In 1978-1979, those individuals gambled Fidelity's very existence on the hope that market interest rates would remain low for the foreseeable future. Fidelity thus committed itself, in exchange for substantial fees, to

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[6] H.R. REP. No. 1418, 72d Cong., 1st Sess. 3, 8-10 (1932). The System is composed of the Bank Board, the twelve district FHLBs including the respondent Bank, and several thousand member thrift institutions. 12 U.S.C. §§ 1422, 1423, 1437, 1464(a) (1982). The Bank operates under the supervisory and regulatory authority of the Bank Board, an independent federal agency. 12 U.S.C. § 1437 (1982).

[7] The need to preserve the financial integrity of the FHLBs is why the Bank Act instructs them to make only "such advances as may be made safely and reasonably with due regard for . . . *the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations.*" 12 U.S.C. § 1427(j) (1982) (emphasis added).

make an inordinately high volume of mortgage loans at fixed rates, planning to fund those loans with short-term borrowings whose cost was variable and therefore highly sensitive to interest rate fluctuations. *Id.* If market interest rates (and hence the rates on Fidelity's borrowed funds) had declined, Fidelity's three controlling shareholders stood to reap huge profits. But Fidelity lost its gamble because interest rates climbed steadily through the last half of 1979 and remained at high levels through 1982. *Id.* The negative "spread" between Fidelity's interest earnings on its mortgage loans and the cost of its borrowings to fund those loans caused Fidelity to suffer disastrous losses which ultimately caused its demise.

C. The Bank's Extensions Of Credit To Fidelity

The district court found that when Fidelity applied to the Bank for a $75 million regular credit advance in October 1979, "one of the Bank's credit analysts . . . determined by means of a pre-arranged and uniformly-applied formula, that Fidelity was 'overcommitted'." *Pet. App.* E-21.[8] Moreover, the indisputable facts in the appellate record reveal that *before* the Bank decided to deny Fidelity regular credit, Fidelity was given full opportunity to present to the Bank's decision makers all the information it considered relevant to support its request for regular credit, despite the fact that Fidelity itself did *not* request a hearing. The district court additionally found that Fidelity had "ample notice" of the Bank's minimal criteria for regular credit eligibility, and had been amply forewarned that if it were found to be overcommitted it could not qualify for regular credit. *Id.* These uncontroverted facts render patently false Fidelity's assertion to this Court that "[i]nstead of processing [Fidelity's] application [for regular credit], the

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[8] As the Ninth Circuit noted, "Fidelity does not deny that it was ineligible for regular credit advances under the terms of the Bank's established credit program." *Pet. App.* A-6.

Bank arbitrarily placed Fidelity in the OSC category without notice or hearing." [9] *Pet.* 6.

As the Ninth Circuit noted, at no time subsequent to November 1979 was Fidelity ever eligible to receive Bank credit on regular credit terms. *Pet. App.* A-2. Recognizing this fact, in December 1979 Fidelity sought an "exception" to the credit program, *id.*, from the Credit Exceptions Committee ("CEC") of the Bank's board of directors,[10] on the ground that its overcommitment resulted from deregulation of interest rates in October 1979 by the Federal Reserve Board. The appellate record establishes that Fidelity did *not* request a hearing. After thoroughly reviewing Fidelity's written request, the CEC unanimously voted not to grant any exceptions, concluding that Fidelity's failure to meet the overcommitment criterion resulted primarily from its own speculative management practices, not from interest rate deregulation.

Fidelity's second request for a credit exception was submitted to the CEC in February 1980. *Pet. App.* at A-2. At that time, as the appellate record shows, Fidelity still failed to meet the unambiguous requirements of the Bank's credit program both because Fidelity was still overcommitted and because it then had almost $100 mil-

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[9] The appellate record establishes that (i) the credit analysts' two detailed written analyses, which were based on financial information provided by Fidelity itself clearly demonstrating that the Association was overcommitted, were carefully reviewed in two meetings of the Bank's Credit Committee, and by the Bank's President; (ii) before a final determination was made, Fidelity was given the opportunity to, and did, supply additional information regarding its financial condition in a telephone conversation and a face-to-face meeting between officers of Fidelity and the Bank; and (iii) during these discussions, the consequences of Fidelity's overcommitted status were thoroughly reviewed.

[10] Bank Board regulations provided that the Bank's board of directors could, as the record reflects it did, designate a committee that was authorized, but not required, "to approve exceptions" to the Bank's credit policy. 12 C.F.R. § 525.2 (1982).

lion of OSC advances outstanding.[11] Again, Fidelity did *not* request a hearing. After full consideration, the CEC again denied Fidelity's request for an exception that would permit it to regain access to regular Bank credit. *Pet. App.* A-2. Nevertheless, as the Ninth Circuit noted, the CEC did authorize waiver of the 2% charge on Fidelity's OSC advances, *id.*, for a period of up to one year. As the district court found, with this waiver Fidelity paid no more for its OSC advances than it would have paid for regular short-term advances; in fact, it paid less because it did not have to pay any of the commitment fees the Bank routinely charged for regular credit advances. *Pet. App.* E-22. As a result, Fidelity began taking a large amount of OSC advances and, by mid-May 1980, had increased its OSC debt to approximately $700 million. *Cf. Pet. App.* A-2; E-22.

With respect to Fidelity's assertions that the Bank arbitrarily, and without holding hearings, denied alleged requests by Fidelity that the Bank lengthen the maturities of Fidelity's OSC advances, *Pet.* 6, the district court made the following findings based on its independent review of a record created after over two years of discovery on the merits:

> The facts do show that the Bank did engage in negotiations with Fidelity about possibly lengthening some part of Fidelity's debt if Fidelity demonstrated some improvement in its financial conditions, as the Bank defined 'improvement.' . . . Although Fidelity made repeated representations to the Bank to the effect that it intended to 'mend' its ways by selling loans [and paying down its OSC debt with the proceeds, Fidelity's borrowing during the Fall of 198[0]

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[11] Fidelity argued below that it was not overcommitted in February 1980. But it is uncontroverted that Fidelity had outstanding OSC advances at that time, and that, as the Ninth Circuit noted, under the unambiguous terms of the credit program, a member with outstanding OSC advances was ineligible for regular credit on that basis alone. *Pet. App.* A-2.

> remained high, and no significant attempts were made to pay down any of the nearly $700 million debt incurred to the Bank.

Pet. App. E-22.

Fidelity's financial condition continued to worsen through 1981 and the spring of 1982. Nevertheless, Fidelity's requests for OSC advances were uniformly granted until April 1982, when the Bank's Executive Committee determined that Fidelity was hopelessly insolvent, with no realistic prospect of resolving its financial problems, and that the Bank's $1.4 billion in loans was at risk. The Executive Committee therefore directed the Bank's President to make no further advances to Fidelity. The district court found there was "no evidence" that this decision "was anything other than a prudent and merciful act." *Pet. App.* E-23.

D. The Decisions Below

Fidelity alleged, *inter alia*, that the Bank deprived Fidelity of its constitutional right to due process because the Bank did not conduct full-scale adversarial hearings in connection with its decision to deny Fidelity regular credit, and that the Bank's officers and directors violated common law fiduciary duties owed to Fidelity in connection with the Bank's lending decisions. On the Bank's motion to dismiss, the district court held that Fidelity had no procedural due process claim because there was no "federal action" and because Fidelity had no protectable property interest in receiving Bank advances on regular credit terms. *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 589 F. Supp. 885, 897-98 (N.D. Cal. 1983); *Pet. App.* D-17-20. The court declined, however, to dismiss Fidelity's claim that the Bank had committed breaches of federal common law fiduciary duties owed to Fidelity as a stockholder of the Bank. *Id.* at 898-901; *Pet. App.* D-20-25.

The parties then undertook over two years of discovery in which Fidelity was given every opportunity to

establish that the Bank's credit decisions were motivated by "bad faith" and thus constituted breaches of a fiduciary duty. Fidelity could adduce no such evidence. Accordingly, the district court granted the Bank's summary judgment motion, holding that "[a]fter over two years of discovery . . . Fidelity presents no evidence that the Bank or any director acted in bad faith, or in a grossly negligent manner, with respect to any credit decision affecting its OSC program in general, or to loans to Fidelity specifically." *Pet. App.* E-7.

Thereafter, more than two years after its original complaint was filed, and two months after the district court announced its decision granting summary judgment in the Bank's favor, *Pet. App.* F-2, 4, Fidelity moved to amend its complaint for a fourth time to add new claims for breach of contract and for breach of an implied covenant of good faith and fair dealing. *Id.* at F-2-3. The district court denied the motion because it was untimely, prejudicial to the Bank, and asserted new claims that were merely restatements of Fidelity's earlier claims that had already been dismissed by the district court. *Id.* at F-4-6.

The Ninth Circuit affirmed the district court's final judgment in favor of the Bank. *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432 (9th Cir. 1986); *Pet. App.* A.[12] The Court of Appeals held that Fidelity had no protectible property interest in receiving advances under the Bank's regular credit terms because Fidelity could not show that existing rules and understandings gave Fidelity any "legitimate

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[12] As is apparent from the face of the Ninth Circuit's opinion, *Pet. App.* A-3-9, Fidelity raised only three issues for review by that court: whether Bank advances are "property" within the meaning of the Fifth Amendment; whether the district court abused its discretion in denying Fidelity leave to file a fourth amended complaint; and whether the district court should have applied the business judgment rule with respect to Fidelity's fiduciary duty claim.

claim of entitlement" to such advances. *Pet. App.* A-6, *citing Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Ninth Circuit observed that, under the Bank Act and governing Bank Board regulations, the Bank's discretion to grant or deny advance requests was "so unconstrained by specific limiting criteria that it did not give rise to a property interest in receiving regular credit advances." *Id.* at A-7.

The Ninth Circuit further held that the district court did not abuse its discretion by denying Fidelity leave to file a fourth amended complaint. The Court of Appeals stated that the district court's discretion to deny leave to amend is "particularly broad where the court has already given the plaintiff an opportunity to amend its complaint." *Pet. App.* A-9. The Ninth Circuit also agreed with the district court that Fidelity was "simply restating its prior claims under new labels." *Id.*

Finally, the Ninth Circuit rejected Fidelity's challenge to the entry of summary judgment in favor of the Bank on Fidelity's claim of breach of a federal common law fiduciary duty. *Pet. App.* A-7-9. The Ninth Circuit held that Fidelity had no fiduciary duty claim under federal common law and, therefore, that it was unnecessary to rule on the merits of the district court's decision that the Bank had not breached such duty. *Id.* at A-8.[13]

REASONS FOR DENYING THE WRIT

The Ninth Circuit was correct in ruling that Fidelity had no protectable property interest in receiving advances under the Bank's regular credit program because the

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[13] Fidelity has not sought review of the fiduciary duty issue, perhaps recognizing that it could never hope to establish the breach of such a duty, even if one existed. As the district court found, "after two years of discovery . . . Fidelity has failed to provide this Court with one shred of evidence to support its allegations that the officers' and directors' decisions affecting Fidelity were influenced by personal hostility or any improper motive." *Pet. App.* E-20.

Bank's lending discretion is unconstrained by specific limiting criteria. *Pet. App.* A-7. Neither this nor the other questions advanced by Fidelity present substantial issues for this Court's consideration.

I. THE NINTH CIRCUIT CORRECTLY REJECTED FIDELITY'S DUE PROCESS CLAIM BECAUSE BANK ADVANCES ARE NOT "PROPERTY" WITHIN THE MEANING OF THE DUE PROCESS CLAUSE

Fidelity's principal contention in its petition is that the Bank denied regular credit to Fidelity without due process hearings. The district court rejected this contention on the grounds that (i) the Bank's lending activities do not constitute "federal action" for constitutional purposes, and (ii) Bank advances are not "property" within the meaning of the Fifth Amendment Due Process Clause, U.S. CONST. amend. V. *Pet. App.* D-16-19. The Ninth Circuit stated that it was "questionable whether the challenged Bank actions may be deemed governmental." *Pet. App.* A-5. The court found it unnecessary to resolve this issue, however, because it agreed with the district court that Fidelity had no protectable property interest in receiving advances under the Bank's regular credit terms.[14] *Id.* at A-5-7.

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[14] The merits of Fidelity's due process claim cannot be reached unless "federal action" is present, because the Fifth Amendment does not apply to private action. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952). Clearly the district court's resolution of this issue was correct. The operations, funding, and employment of FHLBs are wholly unlike those of administrative units of government that are commonly understood to be "agencies"—the military departments, agencies of the Executive Branch, and the independent commissions. FHLBs are privately owned and privately funded corporations that receive *no* government money, their employees are *not* civil service employees and their daily operations are *not* under governmental control. In making decisions regarding advances, they do not engage in regulatory or adjudicatory matters the way government agencies do. Furthermore, there clearly is no "sufficiently close nexus," *Jackson v. Metropolitan Edison Co.*, 419

A property interest arises from a "legitimate claim of entitlement" created by an independent source such as state or federal law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). This Court has established that there can be no claim of entitlement where the decision maker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested ruling for any constitutionally permissible reason or for no reason at all." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring)). *See also Leis v. Flynt*, 439 U.S. 438, 442-43 (1979).

Fidelity contends that the source of its entitlement to regular Bank credit is the Bank Act and governing Bank Board regulations. *Pet.* 8-9. But, far from creating any *entitlement* to Bank advances, those enactments give members only the *privilege* of applying for advances and afford the Bank complete discretion to deny *any* advance for any reason. As the Ninth Circuit correctly observed, *Pet. App.* A-6, the controlling statutory provision, section 9 of the Bank Act, 12 U.S.C. § 1429 (1982), unam-

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U.S. 345, 351 (1974), between the Bank and the federal government such that the Bank's lending activities *vis-a-vis* Fidelity can be fairly treated as the action of the federal government itself. That test can only be met by showing (i) that the government exercised coercive power or such significant encouragement "that the choice must in law be deemed to be that of the State," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), or (ii) that the defendant exercised powers that are public in nature and "traditionally the exclusive prerogative of the State." *Id.* at 1005 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)). *Accord, Rendell-Baker v. Kohn*, 457 U.S. 830, 840, 842 (1982). The Ninth Circuit noted that Fidelity has not even alleged that the federal government, acting through the Bank Board, coerced or encouraged the Bank to offer only OSC credit to Fidelity. *Pet. App.* A-5. Finally, in making loan decisions the Bank is obviously not engaged in exercising traditionally governmental powers. *Cf. Northrip v. Federal National Mortgage Ass'n*, 527 F.2d 23, 31-32 (6th Cir. 1975).

biguously provides that, while Bank members like Fidelity "shall be entitled to *apply* in writing for advances," the Bank "may *at its discretion* deny *any* such application," or, subject to Bank Board approval, "grant it on such conditions *as the Federal Home Loan Bank* may prescribe." (emphasis added). The applicable Bank Board regulations further emphasize the wholly discretionary nature of Bank advances: "Access by members to advances is a *privilege* which may be limited under the Act." 12 C.F.R. § 531.1(a) (1979) (emphasis added).

Contrary to the unambiguous terms of section 9, Fidelity argues that the Bank Act does not confer plenary discretion to deny advance requests because section 7(j) of the Act, 12 U.S.C. § 1427(j) (1982), provides that the Bank

> shall, subject to the provisions hereof, extend to each institution authorized to secure advances such advances as may be made safely and reasonably with due regard for the claims and demands of other institutions, and with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations.

Fidelity suggests that section 7(j) requires the Bank to make advances when the conditions set forth in it are met. *Pet.* 9. But, as the district court recognized, such a reading would "totally eviscerate" section 9. 589 F. Supp. at 897; *Pet. App.* D-18. The Bank cannot have discretion to deny "any" advance if, at the same time, it is compelled to make all advances that can be made "safely and reasonably." The only interpretation that harmonizes sections 7(j) and 9 is the interpretation the Ninth Circuit adopted, namely, that while the Bank has plenary discretion to deny "any" advance, it may only grant such advances as can be made (i) "safely and reasonably;" (ii) "with due regard to the maintenance of adequate credit standing for the Federal Home Loan Bank and its obligations."

The due process cases upon which Fidelity relies (*Pet.* 7-8) are clearly inapposite. In each, the court found a property or liberty interest under the Due Process Clause because the government's discretion to withhold the particular benefit was either nonexistent or substantially circumscribed.[15] We are aware of no case holding that a claim of entitlement may be created under a statute, like the Bank Act, which gives the relevant authority discretion to deny "any" application for the benefit in question. Lacking such entitlement, Fidelity had no constitutional right to a hearing before its application for regular credit was denied even if the Bank's lending ac-

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[15] Fidelity states that this case is "akin" to *Perry v. Sindermann*, 408 U.S. 593 (1972). *Pet.* 7. But in *Perry*, 408 U.S. at 601, there was a "mutually explicit understanding" that limited the state college's discretion to deny plaintiff tenure except for narrowly circumscribed reasons. In *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 11 (1979), *Pet.* 8, the Nebraska statute provided that the parole board "shall" order release unless certain defined criteria were present. Similarly, in *Allen v. Board of Pardons*, 792 F.2d 1404 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3335 (U.S. Nov. 10, 1986) (No. 86-461), on which Fidelity primarily relies, *Pet.* 7-8, the Montana statute was held to create a protectable liberty interest because, like the statute in *Greenholtz*, it provided that the parole board "shall" grant parole unless the board determined that enumerated reasons existed which would make parole unwise in a given case. 792 F.2d at 1406. The other cases that Fidelity string cites at page 7 of its petition are equally inapposite. *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117 (1926), is a 60-year old case that long antedates the decisions of this Court, like *Board of Regents v. Roth*, 408 U.S. at 64 (1972), that establish the standards for "entitlements" under the Due Process Clause. *Goldberg v. Kelly*, 397 U.S. 254 (1970), involved the termination of established welfare benefits which are, unlike Bank advances merely applied for, "a matter of statutory entitlement for persons qualified to receive them." 397 U.S. at 262. In *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), New York law mandated the admission of lawyers that passed the bar examination if the applicant otherwise possessed the requisite personal character. Neither *Carey v. Quern*, 588 F.2d 230 (7th Cir. 1978), *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946), nor *Endler v. Schutzbank*, 68 Cal. 2d 162 (1968), discuss the issue of what constitutes an "entitlement" for due process purposes.

tivities constitute "federal action" for due process purposes.[16]

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[16] In any event, Fidelity received all the process the Constitution requires. The appellate record is uncontroverted that Fidelity was limited to OSC credit only after the merits of its credit requests were considered by no fewer than seven persons (the Bank's President, five Bank officers and a credit analyst). Fidelity never requested a hearing regarding its initial credit request, which alone is sufficient ground for rejecting its due process claim. *See Great Falls Community T.V. Cable Co. v. F.C.C.*, 416 F.2d 238, 242-43 (9th Cir. 1969); *Island Airlines, Inc. v. Civil Aeronautics Board*, 363 F.2d 120, 124 (9th Cir. 1966). Moreover, Fidelity was given full opportunity to present to the Bank's decision makers all the information it considered relevant to support its request for regular credit. In connection with the two CEC appeals, Fidelity again never asked for a hearing, choosing instead to provide information in written form to the CEC. Following the CEC appeals, Fidelity and the Bank engaged in a continuous "running dialogue" concerning Fidelity's status. During this prolonged process, Fidelity had at least eight face-to-face meetings with top Bank personnel, submitted numerous letters to the Bank concerning its financial position and was in constant telephone communication with the Bank. Indeed, when Fidelity submitted a claim to the Bank and asked that it be heard by the full board of directors, even that unprecedented request was granted. Fidelity also was provided copies of the Bank staff's written comments concerning its claims, and was permitted to respond, which it did by providing the Bank with *five* written submissions, all of which were considered. The Bank's board of directors rejected Fidelity's claim after a twelve hour hearing at which Fidelity's president and counsel appeared and were heard. In short, Fidelity's suggestions that it was not "heard" by the Bank, *Pet.* 6, are simply unfounded.

The fact that the Bank's procedures were not fully adversarial in no way negates the conclusion that they satisfied due process. This Court has held that adversarial, trial-type hearings are not required to satisfy due process where, as here, they would not measurably reduce the risk of an erroneous decision. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13-14 (1979). Moreover, considering the vast number of credit determinations that the 12 district FHLBs make every year, a requirement for trial-type hearings in connection with such determinations would, in all likelihood, make it impossible for them to carry out their statutory purposes, yet contribute almost

II. FIDELITY HAS PRESENTED NO OTHER QUESTIONS MERITING THIS COURT'S CONSIDERATION

Fidelity has raised two additional issues for review by this Court that were never presented to the Ninth Circuit for its review, namely (i) whether a member/shareholder of a FHLB is entitled to judicial review of a denial of an advance request, and (ii) whether a FHLB has a contractual obligation to make advances to a member/shareholder. *Pet.* i. Neither issue deserves this Court's consideration.

A. There Are Adequate Avenues Of Review Available To Member/Shareholders Who Are Denied Credit Advances

Fidelity's petition is replete with baseless allegations that Fidelity has been "denied any review of any of the actions of the Bank," *Pet.* 3; that "[t]his case has not been tried on the merits," *id.*; that members can be denied advances "free from . . . subsequent review, either administrative or judicial," *id.* at 4; and that the court below ruled "there is no judicial remedy." *Id.* The Ninth Circuit never held, however, nor was it ever asked to hold, that a member denied a Bank advance can never receive judicial review of that action. The court ruled only on the issues properly presented to it: that members have no constitutional right to advances on requested terms, and that Bank officers and directors owe members no federal common law fiduciary duties in ruling on advance requests.

In fact, Fidelity did have an available administrative avenue of relief—one supported by the Bank, and the Bank Board and the other eleven FHLBs that filed *amicus* briefs below. *Pet. App.* E-8-9. When Fidelity's request for regular credit was denied, Fidelity could have

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nothing to the accuracy and reliability of their credit determinations. *See Buttrey v. United States*, 690 F.2d 1170, 1178 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); *Basciano v. Herkimer*, 605 F.2d 605, 611 (2d Cir. 1978), *cert. denied*, 442 U.S. 929 (1979).

taken an administrative appeal to the Bank Board. Under the Bank Act, 12 U.S.C. §§ 1421-1449 (1982), the Bank Board has plenary regulatory authority over the individual Banks and unquestionably had the statutory power to compel the Bank to exercise its lending authority in compliance with all governing legal requirements. If the Bank Board did not provide Fidelity adequate redress, Fidelity could then have sought judicial review of the Bank Board's actions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704 (1982). *Cf. North Mississippi Savings Ass'n v. Hudspeth*, 756 F.2d 1096, 1103 (5th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 790 (1986).

In its decision on the Bank's motion to dismiss, the district court also indicated that aggrieved applicants for Bank credit do have a judicial remedy: they can seek review of a Bank's lending decisions under the APA. *Pet. App.* D-13-14. If the APA's standards are violated, the court has the power to grant equitable relief. Fidelity elected not to pursue this remedy, choosing instead to take the Bank's advances and, only after disaster had struck, sue the Bank for money damages alleged to exceed $176 million. This prompted the district court to conclude that Fidelity's "failure to take timely recourse to the avenue of relief provided under the APA, whether for business reasons or otherwise, renders Fidelity's plea for redress a bit much, and a bit too late." [17] *Id.* at D-14.

Either of the foregoing approaches is far more sensible than the approach that Fidelity actually followed. Both permit a Bank's lending decisions to be reviewed by a court or the Bank Board, or both, but require this review to occur shortly after the action complained of has oc-

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[17] The Bank does not believe that it is an APA "agency". But even if it is not, Fidelity could still have pursued its remedy before the Bank Board as discussed above, and if dissatisfied with the results, pursued an APA claim against the Bank Board, which clearly is a federal agency. Moreover, if Fidelity did have a contract claim, it could have pursued that remedy too, had it not waited unduly long before trying to do so.

curred and not, as here, after the alleged damage has already been done.[18]

B. There Is No Sound Reason For This Court To Be Concerned With Fidelity's Contract Claim Which The Court Below Did Not Even Reach

Fidelity's third and fourth "Questions Presented" pose different articulations of whether a FHLB is contractually obligated to make advances to a member. *Pet.* i. But this issue was never presented to the Ninth Circuit for review. All the Court of Appeals decided, or was required to decide, was whether the district court abused its discretion by refusing to allow Fidelity to amend its complaint for a fourth time to allege such a contract-based cause of action. *Pet. App.* A-9. The Ninth Circuit properly ruled that there was no abuse of discretion because (i) Fidelity's motion was untimely; (ii) amendment would have been prejudicial to the Bank;[19] and (iii) Fidelity's proposed contract claims merely restated claims that the district court had already dismissed.[20] *Id.*

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[18] Even so, the Bank's actions were considered on the merits and were subject to judicial review and it is fatuous for Fidelity to suggest otherwise. The district court allowed Fidelity ample opportunity to prove that the Bank's officers and directors breached fiduciary duties to Fidelity. *Pet. App.* D-20-21. The district court ruled against Fidelity, not because it concluded that judicial review was unavailable to it, but because "despite almost two and one half years of unrestricted discovery, Fidelity can neither prove its allegations of 'dastardly deeds' by the Bank, nor establish a single material issue of fact in dispute as to those acts." *Pet. App.* E-3.

[19] The district court's finding of prejudice was based on representations of Fidelity's counsel that adjudication of its contract claims would require reopening the record to examine the facts surrounding two complicated transactions involving other parties. *Pet. App.* F-6.

[20] To the extent that Fidelity's contract claims do rest solely on the facts as they "had been pleaded from the outset," *Pet.* 13, the

Fidelity offers no argument that the Ninth Circuit applied incorrect legal principles in ruling on the abuse of discretion issue.[21] Accordingly, since Fidelity's complaint did not allege a breach of contract and, for the reasons stated, could not be amended to allege such a

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Ninth Circuit was correct in affirming the district court's decision. *See M/V American Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1492 (9th Cir. 1983); *Mende v. Dunn & Bradstreet, Inc.*, 670 F.2d 129, 131 (9th Cir. 1982); *Mir. v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980). Moreover, the Ninth Circuit and the district court were further correct in finding that Fidelity's contract claims merely restated "under new labels," *Pet. App.* A-9, claims the district court had already dismissed. *Id.;* F-5. Thus, Fidelity asserts that the alleged contract consists of the Bank Act and Bank Board regulations. *Pet.* 12. But both the district court and the Ninth Circuit held that Fidelity had no right to advances under those enactments. *Pet. App.* A-6-8; D-17-19. Finally, Fidelity's claim for breach of an implied covenant of good faith and fair dealing, *Pet.* 12, is nothing more than a restatement of its fiduciary duty claim, with respect to which the district court granted summary judgment in the Bank's favor. *Pet. App.* E-15-23. The proposed amendment, therefore, would have been futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). *See e.g., Addington v. Farmer's Elevator Mutual Insurance Co.*, 650 F.2d 663, 666 (5th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981); *Brown-Marx Associates, Ltd. v. Emigrant Savings Bank*, 703 F.2d 1361, 1371 (11th Cir. 1983).

[21] Fidelity baldly asserts that the district court "had an obligation to consider [Fidelity's contract claims] whether or not they were pleaded" because its complaint asked for a "declaration of rights," *Pet.* 12, citing the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, *id.* at 13, and "because the facts [on which its contract claims were based] had been pleaded from the outset." *Id.* Fidelity's Third Amended Complaint, which is in the appellate record, does not reference the Declaratory Judgment Act as a basis for jurisdiction, and nowhere even hints at the elements of a contract action, let alone sets them forth as required by FED. R. CIV. P. 8(a). Indeed, nowhere in any of its four complaints filed with the district court is there any indication that Fidelity was contending that the Bank Act and Bank Board regulations formed the terms of a contract allegedly breached by the Bank. Contrary to Fidelity's unsupported assertions, "there is no duty on the part of the court to create a claim which the plaintiffs have not spelled-out in their complaint." *Printing Specialities*

breach, there is no basis for this Court to consider the legal merits of a contract-based claim for Bank advances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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Date: January 6, 1987

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and Paper Products District Council No. 2 v. International Printing and Graphic Communications Union, 466 F.Supp. 13, 15 n.3 (E.D. Tenn. 1978). *See also Clark v. National Travelers Life Insurance Co.*, 518 F.2d 1167, 1169 (6th Cir. 1975); *Case v. State Farm Mutual Automobile Insurance Co.*, 294 F.2d 676, 677-78 (5th Cir. 1961).

APPENDICES

APPENDIX A

RELEVANT STATUTES

Administrative Procedure Act, 5 U.S.C. § 704 (1982)

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Federal Home Loan Bank Act, 12 U.S.C. § 1464(a) (1982)

§ 1464. Thrift institutions

(a) Chartering and purpose

In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing.

APPENDIX B

RELEVANT REGULATIONS

12 C.F.R. § 525.2 (1982)

§ 525.2 Extension of credit.

Each Bank board of directors shall adopt, and review at least semiannually, a policy on extension of credit to members consistent with this subchapter and stated Board policy. A Bank's officers designated by its board of directors may extend or deny credit and take other action consistent with such credit policy. Exception shall be made only with prior approval of the board of directors, or a committee it has designated to approve exceptions, and in accordance with this subchapter and Board policy. The board of directors shall require such officers to report promptly to it or the executive committee all actions taken under this section and shall review such actions for compliance therewith.

12 C.F.R. § 531.1(a) (1979)

§ 531.1 Policy on advances.

(a) Banks may make advances to members, subject to regulations and restrictions the Board may prescribe. Access by members to advances is a privilege which may be limited under the Act. Advances may be made to meet withdrawals, cover seasonal requirements, and expand residential mortgage portfolios. Advances shall not be made to permit redemption of accounts or payment of withdrawals requested or suggested by the member, but in a rare circumstance and for compelling reasons, a Bank may request the Board to approve making such an advance. In making advances to expand residential mortgage portfolios, Banks shall give due consideration to soundness of credit, need to stabilize home financing, discouragement of building booms, and prevention of distressed conditions in housing and mortgage markets.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C-82-1592-SW

FIDELITY SAVINGS AND LOAN ASSOCIATION,
Plaintiff,

v.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants.

[Filed July 19, 1984]

STIPULATION AND ORDER

Plaintiff Fidelity Savings and Loan Association and Defendants the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation, hereby stipulate, through their counsel of record, to vacate the pretrial and trial dates and to stay any further pretrial, trial or other proceedings in this action until the final disposition, including any petitions for certiorari, of the Appeal to be taken by Fidelity Financial Corporation in its action against the Federal Home Loan Bank of San Francisco, action number C-82-1389-SW ("The Bank Case").

It Is Further Stipulated that in the event Fidelity Financial Corporation's appeal in The Bank Case is denied by the 9th Circuit and Fidelity Financial's Petition for Certiorari is refused by the Supreme Court or the ap-

peal to the Supreme Court is denied on its merits, Fidelity Savings will thereupon dismiss its action against the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation with prejudice.

Dated: July 18, 1984

ANGELL, HOLMES & LEA

By /s/ Barry D. Hovis
BARRY D. HOVIS
Attorney for Plaintiff
Fidelity Financial Corporation

Dated: July 18, 1984

HOPKINS & SUTTER

By /s/ John L. Rogers, III
JOHN L. ROGERS, III
Attorney for Defendant
Federal Home Loan Bank Board

IT IS SO ORDERED.

Dated: 7/19/84.

/s/ Spencer Williams
United States District Judge